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10 Proposed Attorneys for Chapter 11 Debtors  
11 and Debtors in Possession

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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO VALLEY DIVISION**

In re:

IRONCLAD PERFORMANCE WEAR  
CORPORATION, a California corporation,  
Debtor and Debtor in Possession.

In re:

IRONCLAD PERFORMANCE WEAR  
CORPORATION, a Nevada corporation,  
Debtor and Debtor in Possession.

Affects both Debtors  
 Affects Ironclad Performance Wear  
Corporation, a California corporation only  
 Affects Ironclad Performance Wear  
Corporation, a Nevada corporation only

Lead Case No.: 1:17-bk-12408-MB  
(Proposed to be) Jointly administered with:  
1:17-bk-12409-MB  
Chapter 11 Cases

**DEBTORS' MOTION FOR AN ORDER:  
(1) APPROVING FORM OF ASSET  
PURCHASE AGREEMENT FOR  
STALKING HORSE BIDDER AND FOR  
PROSPECTIVE OVERBIDDERS TO  
USE, (2) APPROVING AUCTION SALE  
FORMAT, BIDDING PROCEDURES,  
AND STALKING HORSE BID  
PROTECTIONS; (3) APPROVING  
FORM OF NOTICE TO BE PROVIDED  
TO INTERESTED PARTIES; AND (4)  
SCHEDULING A COURT HEARING  
TO CONSIDER APPROVAL OF THE  
SALE TO THE HIGHEST BIDDER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

**[Declaration of Geoffrey Greulich Filed  
Concurrently Herewith]**

DATE: September 13, 2017  
TIME: 2:00 p.m.  
PLACE: Courtroom "303"  
21041 Burbank Blvd.  
Woodland Hills, CA

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1 Pursuant to Sections 105(a) and 363 of the United States Code §§ 101, et seq. (the  
2 “Bankruptcy Code”)<sup>1</sup>, Rules 2002, 6004, and 9014 of the Federal Rules of Bankruptcy Procedure  
3 (“FRBP”), and 6004-1(b) and 9013-1 of the Local Bankruptcy Rules (“LB”), Ironclad  
4 Performance Wear Corporation, a California corporation (“Ironclad California”), and Ironclad  
5 Performance Wear Corporation, a Nevada corporation (“Ironclad Nevada”, and with Ironclad  
6 California, the “Debtors” or “Ironclad”), the debtors and debtors-in-possession in the above-  
7 captioned Chapter 11 bankruptcy cases<sup>2</sup>, hereby file this emergency motion (the “Bid Procedures  
8 Motion”)<sup>3</sup> for the entry of an order (the “Bid Procedures Order”) in substantially the form  
9 attached as **Exhibit B** to the concurrently filed Declaration of Geoffrey Greulich (the “Greulich  
10 Declaration”) [Docket No. 6]:

11 (1) approving the form of the Asset Purchase Agreement dated September 8,  
12 2017 (the “APA”) between the Debtors and Radians Wareham Holding, Inc.  
13 (“Purchaser”), a true and correct copy of which is attached as **Exhibit A** to the Greulich  
14 Declaration, pertaining to a sale of substantially all of the Debtors’ assets (excluding cash  
15 and causes of action) (the “Purchased Assets”)<sup>4</sup> to be used by (a) Purchaser as the  
16 stalking horse bidder for the Purchased Assets, and (b) any prospective overbidders (each  
17 an “Overbidder” and collectively, the “Overbidders”) who seek to participate in a hoped  
18 for auction sale (“Auction”) of the Purchased Assets;

19 (2) approving the format, bidding procedures, and stalking horse bid  
20 protections (the “Bidding Procedures and Protections”) relating to the proposed Auction  
21

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<sup>1</sup> Unless otherwise stated, all section references herein are to the Bankruptcy Code.

23 <sup>2</sup> Concurrently herewith, the Debtors have filed a motion seeking to have their two Chapter 11 bankruptcy cases  
24 jointly administered.

25 <sup>3</sup> LBR 6004-1(b)(1) provides that a Sale Procedures Motion may be scheduled on not less than 7 days notice to  
26 applicable parties, unless an order setting hearing on shortened notice is obtained under LBR 9075-1(b). For all of  
the reasons described herein, the Debtors request that the Court consider approval of this Bid Procedures Motion on  
less than 7 days notice.

27 <sup>4</sup> The Debtors are not seeking approval of the actual sale of the Purchased Assets pursuant to this Bid Procedures  
28 Motion. The Debtors will file a separate motion with the Court (the “Sale Motion”) seeking approval of the actual  
sale of the Purchased Assets free and clear of liens, claims, encumbrances and interests, pursuant to Section 363, at a  
later date and have the Sale Motion heard on a date to be set by the Court pursuant to this Bid Procedures Motion.

1 described below and in the annexed Memorandum of Points and Authorities (the  
2 “Memorandum”);

3 (3) approving the form of notice (the “Auction Notice”) to be provided by the  
4 Debtors to their creditors and to be provided by the Debtors’ investment banker to  
5 prospective Overbidders in the form attached as Exhibit C to the Greulich Declaration;  
6 and

7 (4) scheduling the Auction and a hearing (the “Sale Hearing”) in late October,  
8 2017 before the Court to consider the Sale Motion and approval of the sale of the  
9 Purchased Assets to the highest bidder, which Auction and Sale Hearing the Debtors  
10 propose to hold concurrently before the Court.

11 The principal terms of the APA are summarized as follows:<sup>5</sup>

- 12 1. Purchaser will be paying a cash purchase price of either \$15 million or \$20  
13 million depending upon the occurrence of an event which is sensitive and is the  
14 subject of a motion the Debtors are filing under seal, which the Debtors hope will  
15 be granted by the Court. It should be noted that the Debtors believe the total debt  
16 in these cases (both secured and unsecured combined) is or will be in the range of  
approximately \$8-\$10 million, which means that all creditors are expected to be  
paid in full with there being a substantial distribution to the shareholders of the  
parent company, which is a publicly traded company.
- 17 2. Purchaser has deposited \$1 million cash with Debtors’ bankruptcy counsel which  
Purchaser will forfeit to the Debtors’ estates if Purchaser elects not to proceed  
with its purchase of the Purchased Assets.
- 18 3. The Debtors’ proposed sale to Purchaser is subject to overbid with a minimum  
proposed overbid of at least \$750,000 or any higher figure which is wholly  
divisible by \$250,000.
- 19 4. The Debtors’ proposed subsequent bidding increments will be \$250,000 or higher  
figures which are wholly divisible by \$250,000.
- 20 5. The proposed break-up fee to Purchaser is \$500,000.
- 21 6. The proposed Auction will occur (subject to the availability of the Court) in the  
Court in late October, 2017. The Auction is set up so that the break-up fee to be  
paid to Purchaser in the event of a successful overbid will not count towards  
determining the highest bid in order to entice prospective overbidders to  
participate in the Auction and not be intimidated into thinking that Purchaser has  
a bidding advantage at the Auction.

26  
27 <sup>5</sup> This summary is for informational purposes only. Parties in interest should read the entire APA and the exhibits  
thereto. To the extent there are any inconsistencies between this summary and the actual terms of the APA and the  
28 exhibits thereto, the terms of the APA and the exhibits thereto shall govern in all respects.

1        The Debtors' business was actively marketed for sale for an extended period prior to the  
2 Debtors' bankruptcy filing by a qualified investment banker. Prospective buyers had the ability  
3 to purchase assets or equity. While a number of prospective buyers expressed and continued to  
4 express interest in possibly purchasing the Debtors' assets or stock, the Debtors ran out of time  
5 to continue with their pre-bankruptcy marketing process because (i) the Debtors were out of  
6 funds, (ii) the Debtors could not continue to operate without both access to their own cash  
7 receipts as well as receipt of additional financing, and (iii) Purchaser (which is also the Debtors'  
8 secured creditor having purchased the Debtors' pre-bankruptcy secured bank debt) had exercised  
9 its secured creditor rights and was sweeping all of the Debtors' cash and was no longer willing to  
10 continue to forbear or advance additional needed financing to the Debtors absent a global  
11 resolution with the Debtors which was accomplished with the APA and the DIP financing  
12 agreement the Debtors entered into with Purchaser which is the subject of a separate emergency  
13 motion.

14        The purchase offer provided to the Debtors by Purchaser was the best offer the Debtors  
15 had received by the Petition Date, and Purchaser was ready to proceed with its purchase and lend  
16 the Debtors sufficient funds to enable the Debtors to operate their business through an Auction to  
17 take place in late October, 2017 with a sale closing to occur shortly thereafter. Purchaser was  
18 also willing to permit the Debtors to proceed with a robust post-bankruptcy marketing and  
19 hopeful overbid process to insure that the highest and best price is paid for the Debtors' assets.  
20 Given the breadth of the Debtors' pre-bankruptcy marketing process and the fact that the  
21 Debtors' pre-bankruptcy investment banker (who is already very familiar with the various  
22 prospective overbidders) will be serving as the Debtors' post-bankruptcy investment banker and  
23 leading the overbid sale process, and the fact that the likely overbidders are already deep into the  
24 due diligence process, the Debtors are confident that providing prospective overbidders with  
25 approximately six weeks to decide whether to participate in the Auction is a sufficient amount of  
26 time for the Debtors to achieve the highest and best price for their assets. Also, and very  
27 importantly, the Debtors' financial needs expand in the last two months of the year to  
28 accommodate seasonal builds and the Chinese New Year disruption of suppliers so if the Debtors

1 are required to continue to operate their business through the end of the year or significantly  
2 beyond October 31, 2017, the Debtors will need to borrow additional funds which could result in  
3 substantially reducing the ultimate recovery for the Debtors' shareholders. It is for this reason  
4 that it is very important that the Debtors' be authorized to implement their proposed sale  
5 timeline.

6 The Debtors are requesting the Court to approve this Bid Procedures Motion on an  
7 emergency basis in order to provide prospective overbidders with the maximum amount of time  
8 possible to understand the overbid process and provide clear direction and guidelines because  
9 doing so will maximize the prospects for a successful Auction and insure that under the  
10 circumstances, the highest and best price is paid for the Purchased Assets.

11 **WHEREFORE**, the Debtors respectfully request that this Court enter a Bid Procedures  
12 Order, in substantially the form attached as Exhibit B to the Greulich Declaration:

13 (1) approving the form of APA between the Debtors and Purchaser attached  
14 as Exhibit A to the Greulich Declaration to be used by (a) Purchaser as the stalking horse  
15 bidder for the Purchased Assets, and (b) any Overbidders who seek to participate in the  
16 Auction;

17 (2) approving the Bidding Procedures and Protection relating to the Auction  
18 described above and in the annexed Memorandum;

19 (3) approving the form of Auction Notice to be provided by the Debtors to  
20 their creditors and to be provided by the Debtors' investment banker to prospective  
21 Overbidders in the form attached as Exhibit C to the Greulich Declaration;

22 (4) scheduling the Auction and the Sale Hearing in late October, 2017 before  
23 the Court to consider the Sale Motion and approval of the sale of the Purchased Assets to  
24 the highest bidder, which Auction and Sale Hearing the Debtors propose to hold  
25 concurrently before the Court; and

26       ///

27       ///

28       ///

1 (5) granting such other and further relief as the Court deems just and proper.  
2

3 Dated: September 11, 2017

4 IRONCLAD PERFORMANCE WEAR  
5 CORPORATION, *et al.*

6 By: /s/ Ron Bender  
7 RON BENDER  
8 MONICA Y. KIM  
9 KRIKOR J. MESHEFEJIAN  
10 LEVENE, NEALE, BENDER,  
11 YOO & BRILL L.L.P.  
12 Proposed Attorneys for Debtors and  
13 Debtors in Possession

## **MEMORANDUM OF POINTS AND AUTHORITIES**

I.

## **STATEMENT OF FACTS**

**A. Brief Description Of The Debtors And Their Businesses.**

On September 7, 2017 (“Petition Date”), Ironclad Performance Wear Corporation, a California corporation (“Ironclad California”), and its parent corporation Ironclad Performance Wear Corporation, a Nevada corporation (“Ironclad Nevada”), each filed a Voluntary Petition for relief under Chapter 11 of the Bankruptcy Code. Since the Petition Date, Ironclad California and Ironclad Nevada (collectively, the “Debtors” or “Ironclad”) have operated their businesses and managed their affairs as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. The Debtors have sought joint administration of their Chapter 11 cases. Other than owning all of the shares in Ironclad California, Ironclad Nevada has no business. All operations of the Debtors effectively function through Ironclad California.

The Debtors are a leading, technology-focused developer and manufacturer of high-performance task-specific gloves and apparel for the “industrial athlete” in a variety of end markets, including construction, manufacturing, oil and gas (“O&G”), automotive, the sporting goods, military, police, fire, and first-responder. The Debtors’ business is headquartered in Farmers Branch, Texas. Ironclad Nevada is publicly-traded with its common stock quoted on the OTC Markets under the symbol “ICPW”. As of April 7, 2017, Ironclad Nevada had 85,646,354 shares of common stock, par value \$0.001 per share, issued and outstanding. As of August 30, 2017, the Debtors had approximately 41 full time employees, with 9 of these employees who work overseas.

Ironclad was founded in 1998 by Ed Jaeger. Mr. Jaeger was inspired to build gloves that offered protection and performance without sacrificing one for the other. From the beginning, Ironclad built gloves using materials that offered excellent fit to make them an extension of the hand and to make jobs easier for the “industrial athlete”. By 2006, Ironclad offered 35 different task-specific glove types for people wearing gloves as part of their daily jobs.

1        In 2008, the Debtors launched the KONG (King of Oil ‘N’ Gas) line to address the high  
2 number of hand injuries in the O&G field. By 2010, the KONG line was comprised of 46  
3 different gloves. Additionally, Ironclad expanded its presence in the retail and non-professional  
4 markets with the launch of the EXO brand in June 2015. EXO offers lower cost gloves for  
5 automotive, DIY, and outdoor sporting applications. Ironclad offers 30 different EXO glove  
6 types.

7        Ironclad’s task-specific technical glove products are specially designed for individual  
8 user groups. Ironclad currently offers over 160 distinct types of gloves for a variety of markets,  
9 including industrial, construction, DIY, carpentry, machining, package handling, plumbing,  
10 welding, roofing, O&G, mechanics, hunting, and gardening. Products come in a multitude of  
11 colors and cater to the specific demands and requirements of the users based on ease of motion,  
12 grip, water and chemical resistance, visibility, and protection from abrasions, cuts, flames,  
13 impacts, temperature, and vibration. Since inception, Ironclad has employed an internal research  
14 and development (“R&D”) department responsible for identifying and creating new products and  
15 applications, and improving and enhancing existing products. Ironclad is continually evaluating  
16 new base materials for gloves, and grip is another key area of focus for R&D. Ironclad often  
17 partners with industry-leading organizations to develop new products. Ironclad has 13 U.S.  
18 patents issued and 11 foreign patents, as well as five pending U.S. patent applications and several  
19 pending foreign patent applications. Ironclad also uses trademarks to strengthen and protect its  
20 recognizable brand names. Ironclad owns 52 registered U.S. trademarks, 39 registered  
21 international trademarks, and 13 and 43 trademarks pending in the U.S. and internationally,  
22 respectively.

23        Ironclad currently sells its product through approximately 10,000 outlets for professional  
24 tradesmen as well as “Big Box”, hardware, auto parts, and sporting goods retailers. The sales  
25 force is organized by 3 business segments: Industrial, Retail, and International. Glove products  
26 are currently manufactured by multiple suppliers operating in China, Bangladesh, Cambodia,  
27 Vietnam and Indonesia.

1        **B. Events Leading To The Filing Of The Debtors' Bankruptcies And The Debtors'**  
2        **Chapter 11 Goals.**

3           Despite the development and success of the Debtors' products over the years, the  
4        Debtors' revenue and cash flow from operations have been insufficient to support their current  
5        business operations as well as their continued growth. There have been many reasons for this  
6        including heavy competition, loss of a major international distributor, incomplete and/or  
7        ineffective expansion and distribution of all of their product lines and development of new  
8        customers, and higher than anticipated production, manufacturing and warehousing costs. In  
9        addition, it was discovered in early 2017 that under prior management, the Debtors had failed to  
10       provide materially complete and correct financial statements as required under their Loan  
11       Documents (defined below) to their primary secured lender for the fiscal years ended December  
12       31, 2015 and 2016, and for the fiscal quarters ended March 31, June 30, September 30, 2016 and  
13       March 31, 2017. As a result of this discovery, the Debtors' then chief executive officer and other  
14       officers were terminated, and L. Geoffrey Greulich assumed the position of the Debtors' new  
15       chief executive officer effective July 6, 2017. Prior to assuming this position, Mr. Greulich had  
16       no prior connections or relationship with the Debtors as an insider, equity holder or otherwise.  
17       As a Senior Advisor, Operations at Corridor Capital, LLC where he leads operations through  
18       portfolio engagement as well as conducting due diligence, Mr. Greulich was highly qualified to  
19       serve as the Debtors' new chief executive officer. Persons or parties interested in obtaining  
20       specific historical financial history of the Debtors should review the public filings made by the  
21       Debtors with the Securities and Exchange Commission.

22           The Debtors filed their bankruptcy cases to consummate a sale of substantially all of their  
23        assets (excluding cash and causes of action) for the most money possible. Just prior to their  
24        bankruptcy filings, the Debtors entered into an asset purchase agreement ("APA") with the  
25        Debtors' current secured creditor, Radians Wareham Holdings, Inc. ("Radians") or its  
26        affiliate/designee, for a cash purchase price of \$20 million or \$15 million, subject to an overbid  
27        process. Purchaser will be paying a cash purchase price of either \$15 million or \$20 million  
28        depending upon the occurrence of an event which is sensitive and is the subject of a motion the

1 Debtors are filing under seal, which the Debtors hope will be granted by the Court. It should be  
2 noted that the Debtors believe the total debt in these cases (both secured and unsecured  
3 combined) is or will be in the range of approximately \$8-\$10 million, which means that all  
4 creditors are expected to be paid in full with there being a substantial distribution to the  
5 shareholders of the parent company, which is a publicly traded company.

6 The Debtors' business was actively marketed for sale for an extended period prior to the  
7 Debtors' bankruptcy filing by a qualified investment banker. Prospective buyers had the ability  
8 to purchase assets or equity. While a number of prospective buyers expressed and continued to  
9 express interest in possibly purchasing the Debtors' assets or stock, the Debtors ran out of time  
10 to continue with their pre-bankruptcy marketing process because (i) the Debtors were out of  
11 funds, (ii) the Debtors could not continue to operate without both access to their own cash  
12 receipts as well as receipt of additional financing, and (iii) Purchaser (which is also the Debtors'  
13 secured creditor having purchased the Debtors' pre-bankruptcy secured bank debt) had exercised  
14 its secured creditor rights and was sweeping all of the Debtors' cash and was no longer willing to  
15 continue to forbear or advance additional needed financing to the Debtors absent a global  
16 resolution with the Debtors which was accomplished with the APA and the DIP financing  
17 agreement the Debtors entered into with Purchaser which is the subject of a separate emergency  
18 motion.

19 The purchase offer provided to the Debtors by Purchaser was determined by the Board to  
20 be the best offer the Debtors had received by the Petition Date, and Purchaser was ready to  
21 proceed with its purchase and lend the Debtors sufficient funds to enable the Debtors to operate  
22 their business through an Auction to take place in late October, 2017 with a sale closing to occur  
23 shortly thereafter. Purchaser was also willing to permit the Debtors to proceed with a robust  
24 post-bankruptcy marketing and hopeful overbid process to insure that the highest and best price  
25 is paid for the Debtors' assets. Given the breadth of the Debtors' pre-bankruptcy marketing  
26 process and the fact that the Debtors' pre-bankruptcy investment banker (who is already very  
27 familiar with the various prospective overbidders) will be serving as the Debtors' post-  
28 bankruptcy investment banker and leading the overbid sale process, and the fact that the likely

1 overbidders are already deep into the due diligence process, the Debtors are confident that  
2 providing prospective overbidders with approximately six weeks to decide whether to participate  
3 in the Auction is a sufficient amount of time for the Debtors to achieve the highest and best price  
4 for their assets. Also, and very importantly, the Debtors' financial needs expand significantly the  
5 last two months of the year so if the Debtors are required to continue to operate their business  
6 through the end of the year or significantly beyond October 31, 2017, the Debtors may need to  
7 borrow additional money which could result in substantially reducing the ultimate recovery for  
8 the Debtors' shareholders. It is also not clear that any such additional financing would be  
9 available to the Debtors in any event. It is for this reason that it is very important that the  
10 Debtors' be authorized to implement their proposed sale timeline.

11 The Debtors are requesting the Court to approve this Bid Procedures Motion on an  
12 emergency basis in order to provide prospective overbidders with the maximum amount of time  
13 possible to understand the overbid process and provide clear direction and guidelines because  
14 doing so will maximize the prospects for a successful Auction and insure that under the  
15 circumstances, the highest and best price is paid for the Purchased Assets.

16 **C. Summary of the Requested Bidding Procedures and Protections.**

17 As indicated above, a copy of the APA entered into between the Debtors and Purchaser  
18 prior to the Petition Date is attached as Exhibit A to the Greulich Declaration. Section 6.5 of the  
19 APA is the section dealing with the bid procedures. The following is a summary of the Bidding  
20 Procedures and Protections that the Debtors are requesting the Court to approve and which are  
21 what the Debtors and Purchaser agreed to in the APA prior to the Petition Date:<sup>6</sup>

22 1. The initial bid over that submitted by Purchaser in the APA shall be in the  
23 amount of at least \$20,750,000.00 if Purchaser's Aggregate Purchase Price is  
24 Twenty Million Dollars (\$20,000,000.00) and shall be in the amount of at  
25 least \$15,750,000 if Purchaser's Aggregate Purchase Price is Fifteen Million  
26 Dollars (\$15,000,000.00).

27  
28 <sup>6</sup> Any defined term used herein which is not defined herein but which is defined in the APA shall have the same  
definition as provided in the APA.

- 1                   2. Thereafter, bidding shall be in increments of at least \$250,000.00 or figures  
2                   which are wholly divisible by \$250,000.00.
- 3                   3. Only financially qualified parties will be eligible to participate in the Auction  
4                   – with financially qualified parties to mean parties who have demonstrated  
5                   that they have the financial means to consummate their purchase of the  
6                   Purchased Assets without financing unless the financing to be used by them is  
7                   already committed (meaning that any overbid may not contain any financing  
8                   contingency). Any party who participates in the Auction will have completed  
9                   their due diligence of the Debtors and will have no due diligence contingency.
- 10                  4. In order to be eligible to participate in the Auction, prospective overbidders  
11                  will be required at least three business days prior to the Auction (i.e., by 5:00  
12                  p.m. PST on October \_\_, 2017) to (i) deliver a redlined version of the APA to  
13                  counsel for the Debtors, counsel for Purchaser and counsel for any official  
14                  committee formed in the Debtors' bankruptcy cases indicating any changes  
15                  the prospective overbidder is requesting to the APA, and (ii) submit a cash  
16                  deposit of \$2 million, which deposit will be non-refundable and forfeited by  
17                  the prospective overbidder if the prospective overbidder is deemed by the  
18                  Bankruptcy Court to be the winning bidder and fails to close its purchase of  
19                  the Purchased Assets within 14 business days following the entry of the Sale  
20                  Order approving the Debtors' sale of the Purchased Assets to the prospective  
21                  overbidder regardless of whether an appeal has been filed of such Sale Order  
22                  provided there is no entered stay pending appeal - i.e., no final order  
23                  requirement.
- 24                  5. Purchaser will have the right, but not the obligation, to credit bid the  
25                  outstanding balances of its Pre-Bankruptcy Secured Debt and the DIP Facility  
26                  towards its purchase price and any overbid that Purchaser elects to submit.  
27                  Purchaser shall have the right to participate in any Auction.

- 1       6. If any party other than Purchaser is deemed by the Bankruptcy Court to be the
- 2               winning bidder at the Auction, then concurrently with the closing of the
- 3               Debtors' sale of the Purchased Assets to such winning bidder, Purchaser will
- 4               be paid directly out of the sale proceeds (i) the full amount of the Pre-
- 5               Bankruptcy Secured Debt, plus (ii) the full amount of the DIP Facility, plus
- 6               (iii) the Breakup Fee.
- 7       7. If any party other than Purchaser is deemed by the Bankruptcy Court to be the
- 8               winning bidder at the Auction, or if the Debtors elect to proceed with seeking
- 9               confirmation of a plan of reorganization instead of proceeding with a sale of
- 10               the Purchased Assets, Purchaser shall receive a break-up fee (the "Breakup-
- 11               Fee") in the amount of \$500,000.00.
- 12       8. The Break-Up Fee shall be deemed to be an allowed expense of the kind
- 13               specified in Section 503(b) of the Bankruptcy Code and shall be paid solely
- 14               from the proceeds of an Alternative Transaction.
- 15       9. The Debtors shall have the right to schedule the Auction so that the payment
- 16               of the Breakup-Fee to Radians will not be considered in determining the
- 17               highest price bid for the Assets. However, Radians shall be authorized to
- 18               match any qualified overbid and be declared the successful purchaser of the
- 19               Purchased Assets giving consideration in the amount of the required Break-up
- 20               Fee and Prepayment Fee as a component of its matching bid, which Break-up
- 21               Fee and Prepayment Fee will not owing by the Debtors if Radians is the
- 22               winning bidder.
- 23       10. The Debtors will agree to proceed with an accelerated sale process, seeking to
- 24               have the sale approval hearing no later than October 30, 2017.
- 25       11. If Radians is deemed by the Bankruptcy Court to be the winning bidder at the
- 26               Auction and Radians fails to close its purchase of the Purchased Assets within
- 27               14 business days following the entry of the Sale Order (regardless of whether
- 28               an appeal has been filed of the Sale Order provided there is no entered stay

1 pending appeal - i.e., no final order requirement), then Radians shall forfeit  
2 the Buyer Deposit to the Debtors.

3 12. The Debtors' sale of the Purchased Assets to Radians or a successful  
4 overbidder will be free and clear of all liens, claims and interests in  
5 accordance with section 363(f) of the Bankruptcy Code.

6 13. The Debtors have the right to market the Purchased Assets for overbid  
7 pending the Auction and to hire an investment banker or sales agent to assist  
8 the Debtors in this process. However, the collateral of Radians shall not be  
9 used to fund the engagement of an investment banker or sales agent with such  
10 party only being entitled to compensation from the proceeds of the Closing.

11 **II.**

12 **DISCUSSION**

13 **A. LAW AND RULES APPLICABLE TO THIS BID PROCEDURES MOTION.**

14 Section 363(b)(1) provides that “[t]he trustee, after notice and a hearing, may use, sell, or  
15 lease, other than in the ordinary course of business, property of the estate....” 11 U.S.C. § 363  
16 (b)(1). Section 105(a) provides in pertinent part that “[t]he Court may issue any order, process or  
17 judgment that is necessary and appropriate to carry out the provisions of this title.” 11 U.S.C. §  
18 105(a). FRBP 2002 and 6004 govern the scope of the notice to be provided in the event a debtor  
19 elects to sell property of the estate under Section 363; however, with respect to the procedures to  
20 be adopted in conducting a sale outside the ordinary course of a debtor’s business, FRBP 6004  
21 provides only that such sale may be by private sale or public auction, and requires only that the  
22 debtor provide an itemized list of the property sold together with the prices received upon  
23 consummation of the sale. Fed. R. Bankr. P. 6004(f). With that said, LBR 6004-1 provides, in  
24 pertinent part, as follows:

25 **(b) Motion for Order Establishing Procedures for the Sale of  
26 Estate Property.**

27 ...

28 (2) Contents of Notice [of a Sale Procedure Motion]. The  
notice must describe the proposed bidding procedures and include

1 a copy of the proposed purchase agreement. If the purchase  
2 agreement is not available, the moving party must describe the  
3 terms of the sale proposed, when a copy of the actual agreement  
4 will be filed with the court, and from whom it may be obtained.  
5 The notice must describe the marketing efforts undertaken and the  
6 anticipated marketing plan, or explain why no marketing is  
7 required. ....  
8

9 (3) Service of the Notice and Motion. The moving party  
10 must serve the motion and notice of the motion and hearing by  
11 personal delivery, messenger, telephone, fax, or email to the  
12 parties to whom notice of the motion is required to be given by the  
13 FRBP or by these rules, any other party that is likely to be  
14 adversely affected by the granting of the motion, and the United  
15 States trustee. The notice of hearing must state that any response in  
16 opposition to the motion must be filed and served at least 1 day  
17 prior to the hearing, unless otherwise ordered by the court.  
18  
19 ....

20 (6) Break-Up Fees. If a break-up fee or other form of  
21 overbid protection is requested in the Sale Procedure Motion, the  
22 request must be supported by evidence establishing:  
23

- 24 (A) That such a fee is likely to enhance the ultimate  
25 sale price; and
- 26 (B) The reasonableness of the fee.

27 LBR 6004-1(b).

28 Neither the Bankruptcy Code nor the FRBP contain specific provisions with respect to  
1 the procedures to be employed by a debtor in conducting a public or private sale. Nonetheless,  
2 as one Court has stated, "It is a well-established principle of bankruptcy law that the objective of  
3 bankruptcy rules and the [debtors'] duty with respect to such sales is to obtain the highest price  
4 or greatest overall benefit possible for the estate." *In re Atlanta Packaging Products, Inc.*, 99  
5 B.R. 124, 131 (Bankr. N.D. Ga. 1988). Additionally, courts have long recognized the need for  
6 competitive bidding at hearings on private sales; "[c]ompetitive bidding yields higher offers and  
7 thus benefits the estate. Therefore, the objective is 'to maximize bidding, not restrict it.'" *Id.*

8 A corollary to these principles is that the Court should not "cherry-pick" among  
9 contractual provisions, objecting to select individual portions, if the agreement as a whole is  
10 supported by an articulated business judgment. At least one bankruptcy court has expressly  
11 applied this corollary to a transaction including breakup and overbid provisions in the sale of the  
12

1 debtor's business. In *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877 (Bankr. S.D.N.Y.  
2 1990), the Court approved a transaction including provisions relating to a breakup fee and  
3 minimum overbids. In responding to objections to other provisions of the agreement, the Court  
4 held that:

5 The Court is not to second guess the inclusion of some provisions  
6 as long as the Agreement as a whole is within reasonable business  
7 judgment, and the subject provisions do not distort the balance  
8 Congress struck in Chapter 11. Cf. *In re Ames Dep't Stores, Inc.,*  
*Eastern Retailers Service Corp., et al.*, 115 B.R. 34, 37-38 (Bankr.  
9 S.D.N.Y. 1990) (some contractual provisions may be justified by  
10 the need to attract a prospective investor.).

114 B.R. at 886.

11 In regards to break-up fees, in general, “[a] ‘break-up fee’ is an incentive payment to an  
12 unsuccessful bidder who placed the estate property in a sales configuration mode ... to attract  
13 other bidders to the auction.” *In re Financial News Network, Inc.*, 126 B.R. 152, 154 n. 5  
14 (Bankr. S.D.N.Y. 1991); *see also In re Integrated Resources, Inc.*, 147 B.R. 650, 653 (S.D.N.Y.  
15 1992), *app. dismissed on jurisdictional grounds*, 3 F.3d 49 (2d Cir. 1993) (“[a] break-up fee, or  
16 more appropriately, a termination fee, is an incentive payment to a prospective purchaser with  
17 which a company fails to consummate a transaction”). Agreements to provide breakup fees are  
18 designed to compensate the potential acquirer who serves as a catalyst or “stalking horse” which  
19 attracts more favorable offers. *In re S.N.A. Nut Co.*, 186 B.R. 98, 101 (Bankr. N.D.Ill. 1995); *In*  
20 *re 995 Fifth Ave. Assoc., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989).

21 Outside of bankruptcy, a break-up fee is generally allowed as long as it “enhances” the  
22 bidding. *In re S.N.A. Nut Co.*, 186 B.R. at 102. In the bankruptcy context, a break-up fee is  
23 generally permissible “if reasonably related to the bidder’s efforts and the transaction’s  
24 magnitude.” *Cottle v. Storer Communication Inc.*, 849 F.2d 570, 578 (11th Cir. 1988); *In re 995*  
25 *Fifth Ave.*, 96 B.R. at 28. Generally speaking, whether the payment of a break-up fee is  
26 appropriate is evaluated under the “business judgment rule.” *In re S.N.A. Nut Co.*, 186 B.R. at  
27 102. Under this rule, there is a presumption that, in making a business decision, debtor acted on  
28 an informed basis, in good faith and in the honest belief that the action taken was in the best

1 interest of the estate. Therefore, bidding procedures proposed to be utilized by a debtor with  
2 respect to a proposed sale should be approved when the Court determines that such procedures  
3 are fair and do not violate any of the debtor's fiduciary duties. *Id.*

4       In evaluating the appropriateness of a break-up fee, the appropriate question for the Court  
5 to consider is "whether the break-up fee served any of three possible useful functions: (1) to  
6 attract or retain a potentially successful bid; (2) to establish a bid standard or minimum for other  
7 bidders to follow; or (3) to attract additional bidders." *In re Integrated Resources, Inc.*, 147 B.R.  
8 at 662. The published opinions addressing break-up fees provide for a broad range of break-up  
9 fees, typically in the range of 1-5% of the purchase price. *See, In re Twenver, Inc.*, 149 B.R.  
10 954, 957 (Bankr. D. Colorado 1992) (stating that breakup fees of 1% to 2% are found to be  
11 reasonable in the majority of cases approving such fees); *In re Integrated Resources, Inc.*, 147  
12 B.R. 650, 662 (Bank. S.D.N.Y. 1992) (where the Court heard testimony that the average breakup  
13 fee in the industry is 3.3%); *Cottle v. Storer Communication, Inc.*, 849 F.2d 570 (11<sup>th</sup> Cir. 1988)  
14 (\$18 million termination fee approved using business judgment rule where fee was 1.16% of sale  
15 price); *Samjens Partners I v. Burlington Indus.*, 663 F.Supp. 614 (S.D.N.Y. 1987) (breakup fee  
16 calculated as 2% of the value of the company was "not so onerous as to end the auction"); *In re  
17 Crowthers McCall Pattern, Inc.*, 114 B.R. 877 (Bankr. S.D.N.Y. 1990) (approving \$500,000  
18 break-up fee in a \$45 million sale – 1.11%); and *Beebe v. Pacific Realty Trust*, 578 F.Supp. 1128  
19 (D. Or. 1984)(termination fee calculated as 1% of the transaction was reasonable).  
20 Notwithstanding the foregoing, Break-up fees of over three percent have been routinely  
21 approved in the context of bankruptcy sales. *See, In re CXM, Inc.*, 307 B.R. 94, 103–04 (Bankr.  
22 N.D. Ill. 2004) (Court approved break-up fee in amount equal to the actual expenses that the  
23 stalking horse incurred in connection with its bid to buy the Sale Assets, subject to a maximum  
24 cap of \$200,000, which equaled 3% of the cash purchase price of \$5,914,000); *In re Women  
25 First Healthcare, Inc.*, 332 B.R. 115, 118, (Bankr. D. Delaware 2005) (Court approved break-up  
26 fee and expense reimbursement that equaled 4.7% percent of the purchase price; *In re Dan  
27 River, Inc.*, No. 04-10990 (Banker.N.D.Ga. December 17, 2004) (Court approved break-up fee  
28 equal to 5.3% of the cash purchase price); and *In re Lake Burton Development, LLC*, No. 09-

1 22830 (Bankr.N.D.Ga. April 1, 2010) (Court approved break-up fee equal to 4.75% of cash  
2 purchase price).

3 The Debtors submit that all of the bidding procedures the Debtors are seeking to have the  
4 Court approve, including the proposed break-up fee to Purchaser, satisfies all three of the useful  
5 functions prescribed by the *Integrated Resources* case (i.e., (1) to attract or retain a potentially  
6 successful bid; (2) to establish a bid standard or minimum for other bidders to follow; and (3) to  
7 attract additional bidders). The proposed break-up fee of \$500,000 (which will be 2.5% if the  
8 purchase price ends up being \$20 million and will be 3.33% if the purchase price ends up being  
9 \$15 million) is well within the percentage parameters that have been approved by many other  
10 courts. It would not have been possible for the Debtors to obtain a stalking horse bidder with a  
11 purchase price in this range without the payment of a comparable break-up fee.

12 For all of the reasons described above, the Debtors would not have been able to survive  
13 as an ongoing business if the Debtors were not able to stop the cash sweep implemented by their  
14 secured creditor and obtain the additional financing their secured creditor has agreed to provide.  
15 But in addition, it is critical that the Debtors consummate their sale by around the end of  
16 October, 2017 because after that their financial needs grow significantly, and the Debtors do not  
17 currently have in place anyone offering to provide the Debtors with the needed additional  
18 financing. But even if the Debtors did have such additional financing available to them,  
19 borrowing even more money would simply result in increasing the amount of the Debtors' debt  
20 that would have to be satisfied before shareholders would receive a distribution and therefore  
21 reduce the ultimate recovery for shareholders.

22 The Debtors believe that even if the Debtors would have been able to obtain use of their  
23 cash collateral (with or without the consent of their secured creditor) and even if the Debtors  
24 could have found someone else willing to provide the Debtors with their necessary financing,  
25 going into these bankruptcy cases with no stalking horse bidder and simply conducting an open  
26 auction ran the risk of chaos and uncertainty. The Debtors feel very strongly that having a  
27 stalking horse bidder in place will create organization and stability for the Debtors, their  
28 employees, their suppliers and their customers as well as create a clear and organized sale

1 structure and guidelines for prospective Overbidders to be able to compete against, which is  
2 likely to enhance and maximize the prospects for an overbid at the Auction and enhance the  
3 ultimate sale price paid for the Purchased Assets. None of this would have been possible if not  
4 for Purchaser's stalking horse bid, and Purchaser understandably would not have been willing to  
5 serve as the stalking horse bidder without the assurance of the \$500,000 break-up fee. The  
6 Debtors believe that the under the circumstances of these cases, the \$500,000 break-up fee is  
7 reasonable and appropriate and would undoubtedly have been required by any stalking horse  
8 bidder. As noted above, Purchaser has agreed to a key provision of the overbid process which is  
9 rare in today's bankruptcy auction world which is to provide the Debtors the flexibility of not  
10 counting the break-up fee in determining the highest and best price bid for the Purchased Assets  
11 so that the Debtors and their investment banker can legitimately advertise to prospective  
12 Overbidders that they will not be incurring any bidding disadvantage as a result of not serving as  
13 the stalking horse bidder.

14 The Debtors strongly believe that proceeding with the Bidding Procedures and  
15 Protections as proposed by the Debtors herein and as agreed to between the Debtors and  
16 Purchaser (subject of course to the approval of the Court) is in the overwhelming best interests of  
17 the Debtors and their estates.

18 **B. THE APPLICABLE REQUIREMENTS OF LBR 6004-1 HAVE BEEN**  
19 **SATISFIED.**

20 Here all of the applicable requirements of LBR 6004-1(b) pertaining to the Bid  
21 Procedures Motion and the request therein to approve the Bidding Procedures and Protections  
22 have been satisfied. First, as required by LBR 6004-1(b)(2), the Notice of the Bid Procedures  
23 Motion describes the proposed Bidding Procedures and Protections and includes a copy of the  
24 APA. Second, as required by LBR 6004-1(b)(2), the Notice of the Bid Procedures Motion and  
25 this Memorandum describe marketing efforts undertaken and the anticipated marketing of the  
26 Purchased Assets through the deadline for prospective Overbidders to submit bids for the  
27 Auction. Third, as required by LBR 6004-1(b)(3), the Notice of the Bid Procedures Motion, Bid  
28 Procedures Motion, and this Memorandum were served on the twenty largest unsecured creditors

1 in the fastest manner possible under the circumstances. Therefore, the Debtors submit that  
2 service of the Notice of the Bid Procedures Motion, Bid Procedures Motion, and this  
3 Memorandum by such means was adequate and appropriate.

4 **III.**

5 **CONCLUSION**

6 Based upon all of the foregoing, the Debtors respectfully request that this Court enter a  
7 Bid Procedures Order, in substantially the form attached as **Exhibit B** to the Greulich  
8 Declaration:

9 (1) approving the form of APA between the Debtors and Purchaser attached  
10 as **Exhibit A** to the Greulich Declaration to be used by (a) Purchaser as the stalking horse  
11 bidder for the Purchased Assets, and (b) any Overbidders who seek to participate in the  
12 Auction;

13 (2) approving the Bidding Procedures and Protection relating to the Auction  
14 described above and in the annexed Memorandum;

15 (3) approving the form of Auction Notice to be provided by the Debtors to  
16 their creditors and to be provided by the Debtors' investment banker to prospective  
17 Overbidders in the form attached as **Exhibit C** to the Greulich Declaration;

18 (4) scheduling the Auction and the Sale Hearing in late October, 2017 before  
19 the Court to consider the Sale Motion and approval of the sale of the Purchased Assets to  
20 the highest bidder, which Auction and Sale Hearing the Debtors propose to hold  
21 concurrently before the Court; and

22 (5) granting such other and further relief as the Court deems just and proper.

23 Dated: September 11, 2017

24 IRONCLAD PERFORMANCE WEAR  
CORPORATION, *et al.*

25 By: /s/ Ron Bender  
26 RON BENDER  
27 LEVENE, NEALE, BENDER,  
28 YOO & BRILL L.L.P.  
Proposed Attorneys for Debtors and  
Debtors in Possession

## **PROOF OF SERVICE OF DOCUMENT**

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 10250 Constellation Boulevard, Suite 1700, Los Angeles, CA 90067

A true and correct copy of the foregoing document entitled **DEBTORS' MOTION FOR AN ORDER: (1) APPROVING FORM OF ASSET PURCHASE AGREEMENT FOR STALKING HORSE BIDDER AND FOR PROSPECTIVE OVERBIDDERS TO USE, (2) APPROVING AUCTION SALE FORMAT, BIDDING PROCEDURES, AND STALKING HORSE BID PROTECTIONS; (3) APPROVING FORM OF NOTICE TO BE PROVIDED TO INTERESTED PARTIES; AND (4) SCHEDULING A COURT HEARING TO CONSIDER APPROVAL OF THE SALE TO THE HIGHEST BIDDER; MEMORANDUM OF POINTS AND AUTHORITIES** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **September 11, 2017**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Ron Bender rb@lnbyb.com
- S Margaux Ross margaux.ross@usdoj.gov
- United States Trustee (SV) ustpregion16.wh.ecf@usdoj.gov
- Sharon Z. Weiss sharon.weiss@bryancave.com, raul.morales@bryancave.com

**2. SERVED BY UNITED STATES MAIL:** On **September 11, 2017**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

*Service information continued on attached page*

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **September 11, 2017**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

**Served via Attorney Service**

---

Hon. Martin R. Barash  
United States Bankruptcy Court  
21041 Burbank Boulevard, Suite 342  
Woodland Hills, CA 91367

☒ Service List served by Overnight Mail attached

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

September 11, 2017      Stephanie Reichert      /s/ Stephanie Reichert  
Date      Type Name      Signature

**Served by Overnight Mail:**

Ironclad Performance Wear (8300)  
OUST, Secured & Top 20

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U. S. Securities and Exchange  
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**Secured Creditor**

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